IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11206 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GUJARAT WATER SUPPLY AND SEWERAGE BOARD

Versus

PAGI MALABHAI ANDARBHAI

Appearance:

1. Special Civil Application No. 11206 of 2000

MR DG CHAUHAN for Petitioner No. 1

MR YV SHAH for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 17/12/2003

ORAL JUDGEMENT

The observations made by the Hon'ble apex court in the matter of Central Inland Water Transport

Corporation Ltd. and another versus Brojo Nath and another, reported in AIR 1986 SC 1571 are relevant in the facts of the present case. They are, therefore, reproduced as under:

"28. The law exists to serve the needs of the society which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. It must keep time with the heartbeats of the society and with the needs and aspirations Of the people. As the society changes, the law cannot remain immutable. The early nineteenth century essayist and wit, Sydney Smith, said, 'Then I hear any man talk of an unalterable law, I am convinced that he is an unalterable fool." The law must, therefore, in a changing society march in tune with the changed ideas and ideologies. Legislatures are, however, not best fitted for the role of adapting the law to the necessities of the time, for the legislative process is too slow and the legislatures often divided by politics, slowed down by periodic elections and overburdened with myriad other legislative activities. A constitutional document is even less suited to this task, for the philosophy and the ideologies underlying it must of necessity be expressed in broad and general terms and the process of amending a Constitution is too cumbersome and time-consuming to meet the immediate needs. This task must, therefore, of necessity fall upon the courts because the courts can by the process of judicial interpretation adapt the law to suit the needs of the society."

#. Heard learned advocate Mr. D.G. Chauhan for the petitioner. Learned advocate Mr. Y.V. Shah is appearing for the respondents. In this petition, the petitioner GUJARAT WATER SUPPLY AND SEWERAGE BOARD has challenged the award made by the labour court, Godhra in Reference No. 570 of 1992 dated 20th August, 1999 wherein the labour court has set aside the order of termination and has granted reinstatement in service without back wages for the intervening period with a direction to the petitioner to implement the award in question within thirty days from the date of publication thereof. On 18th July, 2001, while admitting the petition by issuing rule thereon, this Court has granted

ad.interim relief in terms of para 12(B) of the petition. The workman has filed affidavit of unemployment dated 16th July, 2002, copy of which has been served upon the advocate for the petitioner on 18th July, 2002. Said affidavit of unemployment filed by the workman has not been controverted by the petitioner. Thereafter, on 14th September, 2001, this court has while continuing the ad.interim relief with modification, observed that the petitioner may comply with the provisions of section 17-B of the Industrial Disputes Act, 1947 from the date of the award in question and the workman was directed to file necessary affidavit under section 17-B of the ID Act, 1947. Learned advocate Mr.D.G. Chauhan appearing for the petitioner has submitted that he is not able to make statement as to whether any payment has been made or not by the petitioner to the workman in compliance of section 17-B of the ID Act, 1947.

#. Learned advocate MR. Chauhan has, first of all, referred to the statement of claim filed by the workman dated 8th January, 1993 wherein two facts have been high lighted by him that the workman was appointed on 11th May, 1987 and his services were terminated on 30th April, 1989 and he raised the industrial dispute on 2nd November, 1992 after a period of three years. Thereafter, he referred to the written statement Annexure-B page 16 and has thereafter read para 2 thereof before this court and submitted that the petitioner was appointed in scarcity work and after completion of the said work, his services were not required and, therefore, his services were terminated by the petitioner. Thereafter, he referred to the evidence of the workman which is at page 20, Annexure-C where he referred to the undertaking or affidavit page 21 tendered by the workman at the time when the appointment was given to the workman in which he agreed that he is accepting the appointment orders for a period of 28 days and he will not raise any claim for future service from the petitioner and that he is aware that this service is for a short term in view of scarcity of water. In second para of the said affidavit, it has been stated by him consciously that he will not approach the Court for further services in this regard. In para 3 of the said affidavit, the workman has stated that as and when he is relieved, he shall be considered to have been discharged with effect from that point of time itself and that he is agreeable for such discharge without raising any claim for further service and that he is not entitled for any public holidays. This affidavit was made by the workman in the capacity of work charge helper before the Deputy Executive Engineer, Public Health (Scarcity) Sub Division, GUJARAT WATER SUPPLY AND

SEWERAGE BOARD, Lunavada. Thereafter, he referred to the award made by the labour court which is at Annexure-D page 22. He read from paragraph 9 and thereafter, two contentions were raised by Mr. Chauhan that the workman was appointed in scarcity work and the workmen whose names have been mentioned in the award at page 29 were not working in the post of hand pump repairing helper and it was not proved by the workmen that they were working on that post and it was not proved that such kind of work was performed by them and thus such facts were not proved by the workmen and, therefore, the labour court has committed gross error in coming to such conclusion that the workmen should continue in service. He relied upon the decision of this court in the matter of JJ Shrimali v. District Development Officer, Mehsana & Ors., reported in 1989 (1) GLR page 396 which is the judgment of the Division Bench of this Court. He also relied upon the decision of the Full Bench of this court in the matter of H.K. Makwana versus State of Gujarat & Ors., reported in 1994 (2) GLH page 213 and submitted that the decision of the division bench of this court reported in 1989(1) GLR 396 has been confirmed by the full bench of this court [1994 (2) GLH 213]. In short, it was his submission that the labour court was having no jurisdiction to adjudicate the reference; provisions of the Industrial Disputes Act, 1947 are not applicable to the petitioner; division bench as well as the full bench of this court has held that the scarcity work is the sovereign function of the State and, therefore, provisions of the Industrial Disputes Act, 1947 are not applicable and the labour court was knowing fully well that the workmen were appointed for scarcity work and yet the labour court adjudicated the reference and passed the impugned award and in doing so, the labour court has erred and, therefore, the award in question is required to be quashed and set aside. Save and except these submissions, no other submissions were made by the learned advocate Mr. Chauhan before this court. Save and except the documents referred to hereinabove, no other documents were referred to by Mr. Chauhan. Save and except the decisions referred to hereinabove, no other decisions were cited by the learned advocate Mr. Chauhan before this Court.

#. On the other hand, learned advocate Mr. Y.V. Shah appearing for the respondent workmen has supported the award in question and has prayed for dismissing this petition with costs.

#. The petitioner is the GUJARAT WATER SUPPLY AND SEWERAGE BOARD and is not the State of Gujarat. The

workman was appointed by the petitioner. Though the undertaking on an affidavit was obtained by the petitioner board on safer side from the workman that he will not claim any right in respect of the services given by the petitioner, it is necessary to note that no appointment order has been issued by the petitioner in favour of the respondent workman. It is clear that such an undertaking on an affidavit has been obtained by the petitioner at the time of offering the job to the workman and, therefore, it cannot be said that it is an undertaking or agreement between the equal parties. The petitioner was in dominating position and was in a position to obtain any writing desired by it while obtaining such an undertaking on affidavit. Such type of undertakings on affidavit that the workman who, if given job, will not claim any right by filing any case against the petitioner about future service as and when his services are terminated by the petitioner are contrary to the public policy and also contrary to the provisions of section 23 of the Contract Act. While offering job to a needy workman, it is very easy for the petitioner to obtain any type of undertaking or affidavit or writing in its favour in these hard days of unemployment in the State. Any undertaking which is contrary to the statutory provisions or obtained by the petitioner board which may come in the way of an employee for enforcing his legal right is considered to be null, void and contrary to the public policy. At this stage, it is required to be noted that the present petitioner is the GUJARAT WATER SUPPLY AND SEWERAGE BOARD.

#. Before this Court, the petitioner has produced an undertaking on affidavit alleged to have been made by the workman where the legal rights of workman have been taken away or the workman has surrendered the same in favour of the petitioner. In view of that, the question arising for this Court's consideration is as to whether such type of undertaking on an affidavit can be considered to be legal and valid or not ? From the perusal of the record, it is clear that the said undertaking on affidavit has not been referred to by the petitioner in its written statement; no evidence has been led in respect of that undertaking before the labour court and the same has also not been produced by the petitioner before the labour court for consideration thereof and no submissions were made by the petitioner to that effect before the labour court but this was the first time this contention, while producing the undertaking on affidavit before this court, has been taken by the petitioner. Such type of undertaking on affidavit between unequal has been considered by the apex court in the matter of Central

Inland Water Transport Corporation Ltd. and another versus Brojo Nath and another, reported in AIR 1986 SC 1571. Relevant observations made by the apex court in the said decision in that regard are reproduced as under:

"(C) Constitution of India, Arts. 14, 39(a), 41 and 226 - Central Inland Water Transport Corporation Ltd. Service Discipline and Appeal Rules (1979), R. 9(i) - R.9(i) empowering Corporation to terminate services of permanent employees without giving any reason and by giving notice - It is void under S. 23 of Contract Act as being opposed to public policy - It is also ultra vires Art. 14 of Constitution and also violative of Directive Principles contained in Arts. 39(a) and 41 - However, right to resign is not void. (Contract Act (9 of 1872), S. 23). 1986 Lab IC 494 (Cal), partly Reversed.

Whereas various other provisions of the service Rules of the Corporation mention grounds on which services of an employee can be terminated, Cl. (i) of Rule is void under S. 23 of the Contract Act is being opposed to public policy and is also ultra vires Art. 14 of the Constitution to the extent that it confers upon the Corporation the right to terminate the employment of a permanent employee by giving him three months' notice in writing or by paying him the equivalent of three months' basic pay and dearness allowance in lieu of such notice in that, besides being arbitrary and unreasonable, it wholly ignores and audi alteram partem rule. It is also violative of directive principles contained in Arts. 39(a) and 41. It cannot be supported on the basis of mutuality on the ground similar right is conferred on employees also. The right conferred on the employee by the clause to resign is, however, not void. 1986 Lab IC 494 (Cal), partly reversed.
(Paras 99, 111, 106, 113)

The principle deducible from various precedents is that the Courts will not enforce and will, then called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. For instance, the above principle will apply where the inequality of bargaining power is the result of the great

disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where as man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however, unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. The types of contracts to which the principle formulated above applies are not contracts which are tainted with illegality but are contracts which contain terms which are so unfair and unreasonable that they shock the conscience of the Court. They are opposed to public policy and require to be adjudged void.

The Officers of the Corporation challenging the validity of the Rules had no real option when they accepted the appointment with the Corporation when the Company in which they were serving was dissolved by the order of High Court after the High Court approved the Scheme of Arrangement entered into by the Company with the Corporation. They had also no choice in the matter of acceptance of the Rules when they were framed as non acceptance would have resulted in termination of their services. The Rules in question form part of the contract of employment between the Corporation and its employees who are not workmen. These employees had no powerful workmen's Union to support them. They had no voice in the framing of the said rules. They had no choice but to accept the said Rules as part of their contract of employment. There is gross disparity between the Corporation and its employees, whether they be workmen or officers. The Corporation can afford to dispense with the services of an officer. It will find hundreds of others to take his place but an officer cannot afford to lose his job because if he does so, there are not hundreds of jobs waiting for him. A clause such as clause (i) of R. 9 is against right and reason. It is wholly unconscionable. It has been entered into between parties between

whom there is gross inequality of bargaining power. R. 9(i) is a term of the contract between the Corporation and all its officers. It affects a large number of persons and it squarely falls within the principle formulated above. A clause such as R. 9(i) in a Contract of employment affecting large sections of the public is harmful and injurious to the public interest for its tends to create a sense of insecurity in the minds of those to whom it applies and consequently is against public good. Such a clause, therefore, is opposed to public policy and being opposed to public policy, it is void under S. 23 of the Contract Act.

(Paras 90, 94, 101)

#. In the matter of Bangalore Water Supply and Sewerage Board v. A. Rajappa (AIR 1978 SC 548), the Constitution Bench of the apex court has held that the Bangalore Water Supply and Sewerage Board is an industry within the meaning of section 2(j) of the ID Act, 1947. In case of COIR BOARD ERNAKULAM KERALA STATE AND ANOTHER V/s. INDIRA DEVAI P.S. AND OTHERS, reported in 2000 SCC (L & S) 120, larger bench of the apex court has considered whether reconsideration of the decision in Bangalore Water Supply and Sewerage Board (supra) would require reconsideration or not and ultimately request for reconsideration of the said decision was rejected. Therefore, in view of the decision given by the apex court in the matter of Bangalore Water Supply and Sewerage Board v. A. Rajappa (AIR 1978 SC 548), the petitioner GUJARAT WATER SUPPLY AND SEWERAGE BOARD is also an industry within the meaning of section 2(j) of the Industrial Disputes Act, 1947. The decision of the apex court in the matter of Bangalore Water Supply and Sewerage Board v. A. Rajappa (AIR 1978 SC 548) is conclusive and binding to the petitioner.

#. Earlier, in the matter of GUJARAT WATER SUPPLY AND SEWERAGE BOARD versus HIRABHAI BHURABHAI, reported in 2002 (2) GLH 717, this court had an occasion to consider the question as to whether the petitioner GUJARAT WATER SUPPLY AND SEWERAGE BOARD is an industry or not. This Court, after considering the decision of the Constitution Bench of the apex court in the matter of Bangalore Water Supply and Sewerage Board v. A. Rajappa (AIR 1978 SC 548) and also after considering the activities carried out by the petitioner, has held that the petitioner is an industry within the meaning of section 2(j) of the ID Act, 1947. The Board is not having power to function any

sovereign function. The powers to function any sovereign function are enjoyed only by the State of Gujarat. No other body or person or corporate body are having such powers. The scarcity work wherein the State of Gujarat has declared any project or work of relief with a view to help the affected citizens, then only in such cases where the State has performed the work during the scarcity has been considered to be the sovereign function and not covered by the provisions of the ID Act, 1947 which is not so in this case. In this case, first of all, the petitioner has not raised such plea before the labour court. Even if it is believed that such plea has been raised by the petitioner before the labour court, considering the activities of the board, the petitioner board is having their own systematic activities organized by the cooperation between the employer and the employee for the production and/or distribution of the goods and services calculated to satisfy the human wants and wishes. Therefore, prima facie, there is an industry in that enterprise. The apex court has observed as under in the matter of Bangalore Water Supply and Sewerage Board v. A. Rajappa (AIR 1978 SC 548) in para 161 of the said judgment:

"161. 'Industry', as defined in Sec, 2 (j) and explained hi 1. 'Industry', as defined in Sec, 2 (j) and explained hi Banerji, has a wide import.

(a) Where (i) systematic activity, (ii) organized by cooperation between employer and employee, (the direct and substantial element is chimerical) (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to, celestial bliss e.g. making, on a large scale, prasad or food), prima facie, there is an 'industry' in that enterprise.

(b) Absence of profit motive or gainful objective is irrelevant, be the venture in the public, joint private or other sector.

(c) The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relations.

(d) If the Organisation is a trade or business, it does not cease to, be one because of philanthropy animating the undertaking.

11. Although sec. 2(j) uses, words of the widest amplitude in its two limbs, their meaning cannot be magnified to overreach itself.

(a) 'Undertaking' must suffer a contextual and associational shrinkage as explained in Banerji and in this judgment, so also, service, calling and the like. This yields the inference that all organized activity possessing the triple elements in I (supra), although not trade or business, may still be 'industry' (provided the nature of the activity, viz. the employer-employee basis, bears resemblance to what we find in trade or business. This takes into the- fold of 'industry' undertakings, callings and services adventure 'analogous to the carrying on of trade or business'. All features, other than the methodology of carrying on the activity viz. in organizing the co-operation between employer and employee may be dissimilar. It does not matter, if off the employment terms there is analogy.

III. Application of these guidelines should not stop short of their logical reach by invocation of creeds, cults or inner sense of incongruity or other sense of motivation for or resultant of the economic operations. The ideology of the Act being industrial peace, regulation and resolution of industrial disputes between employer and workmen, the range of this statutory ideology must inform the reach of the statutory definition. Nothing less, nothing mom.

(a) The consequences are (i) professions, (ii) Clubs (iii) educational institutions (iiia) co-operatives, (iv) research institutes (v) charitable projects and (vi) other kindred adventures, if they fulfil the triple tests listed in I (supra), cannot be exempted from the scope of sec. 2 (j).

(b) A restricted category of professions, clubs, cooperatives and even Gurukulas and little research labs, may qualify for exemption if in simple ventures substantially and going by the dominant nature criterion substantively, in single simple ventures, no employees are entertained but in minimal matters, marginal employees are hired without destroying the

nonemployee character of the unit.

(c) If in a pious or altruistic mission many employ themselves, free or for small honoraria, or likely return mainly by sharing in the purpose or cause, such as lawyers volunteering to run a free legal services clinic or doctors serving in their spare hours in a free medical centre or ashramites working at the bidding of the holiness, divinity or like central personality and the services are supplied free or at nominal cost and those who serve are not engaged for remuneration or on the basis of master and servant, relationship, then, the institution is not an industry even if stray servants, manual or technical, are hired. Such eleemosynary or like undertakings alone are exempt-not other generosity, compassion, developmental passion or project.

IV The dominant nature test :

(a) where a complex of activities, some of which qualify for exemption others not, involves employees on the total undertaking, some of whom are not 'workmen' as in the University of Delhi Case or some departments are not productive of goods and services if isolated, even then, the predominant nature of the services and the integrated nature of the departments as explained in the Corporation of Nagpur, will be true test. The whole, undertaking will be 'industry' although those who are not 'workmen' by definition may not benefit by the status.

(b) Notwithstanding the previous clauses, sovereign functions, strictly understood, alone qualify for exemption, not the welfare activities or economic adventures undertaken by government or statutory bodies.

(c) Even in departments discharging sovereign functions, if there are units which are industries and they are Substantially severable, then they can be considered to come within sec. 2(j).

(d) Constitutional and competently enacted legislative provisions may well remove from the scope of the Act categories which otherwise may be covered thereby.

We over-rule Safdarjung, Solicitors' case, Gymkhana, Delhi University, Dhanrajgirji Hospital and other rulings whose ratio runs counter to the principles enunciated above, and Hospital Mazdoor Sabha is hereby rehabilitated.

We conclude with diffidence because Parliament which has the commitment to the political nation to legislate promptly in vital areas like industry and trade and articulate the welfare expectations in the conscience' portion of the constitution, has hardly intervened to restructure the rather clumsy, vaporous and tall-aud-dwarf definition or tidy up the scheme although Judicial thesis and anti-thesis, disclosed in the two decades long decisions, should have produced a legislative synthesis becoming of a welfare State and Socialistic Society, in a world setting where I.L.O. norms are advancing and India needs updating. We feel confident, in another sense, since counsel stated at the bar that a bill on the subject is in the offing. The rule of law, we are sure, will run with the rule of Life-Indian Life-at the threshold of the decade of new development in which Labour and Management, guided by the State, will constructively partner the better production and fair diffusion of national wealth. We have stated that, save the Bangalore Water Supply and Sewerage Board-appeal, we are not disposing of the others on the merits. We dismiss that appeal with costs and direct that all the others be posted before a smaller bench for disposal on the merits in accordance with the principles of Law herein laid down. "

#. Relying upon the decision of the apex court in the matter of Bangalore Water Supply and Sewerage Board v. A. Rajappa (AIR 1978 SC 548), this court has held as under in para 5 of the judgment in the matter of GUJARAT WATER SUPPLY AND SEWERAGE BOARD versus HIRABHAI BHURABHAI, reported in 2002 (2) GLH 717:

" I have considered the submissions of the learned advocates for the parties. No doubt in written statement, the petitioner board has raised contention that the petitioner board is not an industry within the meaning of section 2(j) of the Industrial Disputes Ac,1947.NO oral evidence has been led by the petitioner board to

justify this contention before the labour court. However, the apex court has considered this question in case of Bangalore Water Supply and Sewerage Board v. A. Rajappa & Ors. , reported in AIR 1978 pg. 548. The decision, referred above is in respect of Bangalore Water Supply and Sewarage Board, whereas, the present petition is filed by the Gujarat Water Supply and Sewerage Board. The names of these two authorities itself suggests that activities of these two corporate authorities can be almost similar and, therefore, the ratio laid down by the Apex Court in case of Bangalore Water Supply Case reported in AIR 1978 pg. 548 is certainly applicable to the facts of this case also. The decision of the Apex Court in case of Bangalore Water Supply v. A. Rajappa, a Reference made by a two Judge Bench in reported decision 1998 (3) SCC pg. 259 to the Hon'ble the Chief Justice of the Supreme Court of India in case of Coir Board Ernakulam Kerala State and another v. Indiradevi PS and Others which is reported in 2000 SC (L & Is) 120. Relevant observations made in paras 1 and 2 are as under:

"1. We have considered the order made in Civil Appeals Nos. 1720-21 of 1990. The judgment in Bangalore Water Supply & Sewerage Board V/s. A. Rajappa was delivered almost two decades ago and the law has since been amended pursuant to that judgment though the date of enforcement of the amendment has not been notified.

2. The judgment delivered by seven learned Judges of this Court in Bangalore Water Supply Case does not, in our opinion, require any reconsideration on a reference being made by a two-Judge Bench of this Court, which is bound by the judgment of the larger Bench."

In view of the decision as referred above, the apex court has come to the conclusion that said decision of the Bangalore Water Supply and Sewerage Board does not require reconsideration on Reference being made by the two Judge of the Apex Court which is bound by the judgment of the Larger Bench. Therefore, in above view of the matter, the issue is well settled that Water Supply and Sewerage Board - petitioner herein is termed as an industry within meaning of Section 2(j) of the I.D. Act, 1947."

#. Considering the aforesaid decision, the petitioner is an industry within the meaning of section 2(j) of the ID Act, 1947. In the aforesaid decision, plea was raised by the petitioner therein that it is not an industry before the labour court but the plea was not substantiated by it by producing necessary evidence to that effect whereas in this case, no such plea has been raised by the petitioner before the labour court and it has been raised by it for the first time before this Court that the activities carried out by it are the sovereign function and, therefore, ID Act, 1947 would not apply to it. However, considering the ratio of the supreme court judgment in the matter of Bangalore Water Supply and Sewerage Board (supra) and also considering the aforesaid decision of this court itself in the matter of the present petitioner itself, and also considering the activities carried out by the petitioner board which are satisfying the tests and requirements as laid down by the apex court in the matter of Bangalore Water Supply and Sewerage Board (supra), according to my opinion, the petitioner board is squarely covered by the ratio of the said decisions and is an industry within the meaning of section 2(j) of the ID Act, 1947 and, therefore, the provisions of the Industrial Disputes Act, 1947 would apply to it. Naturally, therefore, it is necessary for the petitioner board to comply with the mandatory provisions of the ID Act compliance of which is necessary before retrenching or terminating the services of any workman and the non compliance of which would render such retrenchment or termination void ab initio.

##. It is also necessary to be noted that in entire written statement filed by the petitioner board before the labour court in reply to the statement of claim of the workman, the petitioner board has not raised any contention that it is not an industry within the meaning of section 2(j) of the ID Act, 1947; the ID Act, 1947 is not applicable to it. Not only that, the petitioner has also not raised a contention before the labour court that the scarcity work done by the petitioner board is a sovereign function and, therefore, the provisions of the ID Act, 1947 would not be applicable to it. The petitioner is raising such contention before this Court for the first time. Mere mention of the scarcity work wherein the workman worked would not convert the scarcity work into the sovereign function of the State, performed by the petitioner. The petitioner board is not a State of Gujarat to perform the sovereign function of the State within the jurisdiction of the State and that is not the function of the petitioner board. It makes lot of

difference to perform sovereign function by any other authority which is otherwise not empowered for the same in law. In written statement, except the reference of the appointment of the workman in scarcity work, no such contention has been raised by the petitioner that the provisions of the ID Act, 1947 are not applicable and that the scarcity work is not covered by the definition of the term industry within the meaning of section 2(j) of the ID Act, 1947; that the scarcity work performed by the petitioner is the sovereign function. No such contentions were raised by the petitioner before the labour court in its written statement. Not only that, during the course of hearing before the labour court, no such submission has been made by the advocate for the petitioner first party before the labour court. Bare perusal of the award in question makes it clear that no such submission has been made by the petitioner before the labour court at the time of hearing. Bare perusal of the written statement filed by it before the labour court makes it clear that no such contention has been raised by the petitioner before the labour court in its written statement and, therefore, the labour court was not able to deal with and decide such contention. Therefore, in absence of such contentions and submissions, the labour court has dealt with the question that the workman has completed more than two years' continuous service which is not in dispute and before terminating the services of the workmen, legal and mandatory provisions of the Industrial Disputes Act, 1947 were not complied with by the petitioner and that is how the termination was found to be bad in law by the labour court. Now the question is that once when no such contentions were raised by the petitioner before the labour court, whether the petitioner is entitled to raise such contentions before this Court for the first time ? This aspect has been examined by the apex court in the matter of KRISHI UTPADAN MANDLI SAMITI THROUGH ITS SECRETARY, ANAND NAGAR AND ARVIND CHAUBENAND ANOTHER reported in 2003-I-LLJ page 507. In the said matter, the plea that the employer is not an industry was not taken before the tribunal. It was held by the apex court that it could not be canvassed higher up. In para 2 of the said judgment it has been observed by the apex court as under:

"2. Learned senior counsel for the appellant contended that the appellant Mandli Samiti is not an 'industry' governed by the provisions of the UP Industrial Disputes Act, 1947. The High Court has held against the appellant on the ground that such a contention was not canvassed before the Industrial Tribunal and also following an earlier

> decision of another Bench, the High Court dismissed the writ petition. Once the appellant did not raise such a contention before the Industrial Tribunal, it was not available to be canvassed higher up."

##. Therefore, following the decision of the apex court in the matter of KRISHI UTPADAN MANDLI SAMITI THROUGH ITS SECRETARY, ANAND NAGAR AND ARVIND CHAUBENAND ANOTHER reported in 2003-I-LLJ page 507 and considering the facts of the present case, considering the fact that the petitioner has not raised such contentions that it is not an industry or that the provisions of the ID Act, 1947 are not applicable to it or that the work of scarcity done by it is the sovereign function, the petitioner cannot be permitted to raise such contentions now for the first time before this court. I am, therefore, not considering the contentions raised by the petitioner in the memo of petition in that regard as well as the submissions made by the learned advocate Mr. Chauhan in that regard during the course of hearing. If this matter is considered from the another angle that the plea which was not raised before the labour court and raised before this court for the first time, the, this court cannot test the legality, validity and propriety of the award in respect of the new plea as it was not examined by the labour court as it was having no occasion to consider such plea. Therefore, in respect of new plea, as there was no finding given by the labour court in that regard, this court cannot consider that the award is bad because such plea was not examined by the labour court while passing the award in question. Therefore, both these grounds, the contention raised by the learned advocate Mr. Chauhan as the petitioner was performing scarcity work which is considered to be the sovereign function by the Division Bench as well as the Full Bench of this Court and, therefore, ID Act is not applicable to the petitioner, cannot be accepted on one ground that it was not raised before the labour court. Such contention cannot be accepted also on the ground that the decision of the Constitution Bench of the apex court in the matter of Bangalore Water Supply and Sewerage Board (supra) is conclusive, squarely covering the case of the petitioner wherein it has been held that the Bangalore Water Supply and Sewerage Board is an industry within the meaning of section 2(j) of the ID Act, 1947. In view of the above, the petitioner is an industry covered by the definition of the term 'industry' as well as the decision of the apex court in the matter of Bangalore Water Supply and Sewerage Board (supra).

##. Two decisions were cited by the learned advocate Mr. Chauhan for the petitioner. One is the decision of the division bench of this court in the matter of JJ Shrimali v. DDO Mehsana & Ors., reported in 1989 (1) GLR 396 and the another one is the decision of the full bench of this court in the matter of HK Makwana versus State of Gujarat & Ors., reported in 1994 (2) GLH 213 wherein the decision of the division bench of this court in the matter of JJ Shrimali v. DDO Mehsana & Ors.,reported in 1989(1) GLR 396 was approved by the Full Bench of this Court. I have considered the said two decisions cited by the learned advocate Mr. Chauhan. In the said two decisions, the petitioner was not the GUJARAT WATER SUPPLY AND SEWERAGE BOARD. In the said matter, work of particular project and relief as managed by the State of Gujarat has been considered to be the sovereign function. It was not the decision in the said matter that any industry, if it is performing any type of work in scarcity has to be considered as the sovereign function. That is not the ratio of the said decisions. I am, therefore, of the opinion that both the said decisions are relating to the sovereign functions of the state and not in respect of any industry. Therefore, both the said decisions are not applicable to the facts of the present case. The facts of the present case and the facts of the said decisions are altogether different and there is no slightest similarity as regards the factual aspects of the matter and, therefore, said two decisions are not helpful to the petitioner in any manner whatsoever.

##. The next contention raised by Mr. Chauhan is regarding delay on the part of the workman in raising of an industrial dispute. It is the submission of Mr. Chauhan that in view of three years delay in raising of an industrial dispute, the labour court ought not to have adjudicate and allowed the reference. No limitation has been prescribed under the Industrial Disputes Act, 1947 for raising of an industrial dispute. Further, the order of reference made by the appropriate Government has not been challenged by the petitioner before this court on that ground or on the ground that the petitioner is not an industry and, therefore, reference ought not to have been made against it. It is not the case of the petitioner that any such contention about delay has ever been raised by the petitioner during the course of conciliation proceedings means prior to the order of reference. The petitioner accepted the jurisdiction of the labour court on the basis of the reference made by the appropriate Government. As per the Scheme of the Industrial Disputes Act, 1947, reference of the dispute made by the appropriate Government cannot be rejected on

the ground of delay alone and that is the Scheme of the ID Act, 1947. Mere delay in raising of an industrial dispute shall not cease the dispute to exist. Delay in raising of an industrial dispute has to be considered by the labour court while considering the case of the workman for granting the relief. While ultimately granting the relief, the labour court can take it into consideration and can appropriately mould the relief. Therefore, reference made by the appropriate Government cannot be rejected by the labour court on the ground of delay alone. This aspect has been examined by the apex court in the matter of Ajaib Singh versus The Sirhind Cooperative Marketing cum Processing Service Society Ltd. and another reported in AIR 1999 SC 1351. Only Head not of the said decision of the apex court makes it clear that the provisions of the Limitation Act are not applicable to section 10 of the ID Act, 1947. For making of the reference of an industrial dispute to the labour court, provisions of Article 137 of the Limitation Act do not apply. Though delay of seven years shown to be existing and admitted by the workman, it has been held that the court can mould relief by refusing back wages or directing payment of part of the back wages. Relevant observations made by the apex court in para 10 of the said judgment are reproduced as under:

> "10. It follows, therefore, that the provisions of Article 137 of the Schedule to Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. NO reference to the Labour Court can be generally questioned on the ground of delay alone. Even in a case where the delay is shown to be existing, the Tribunal, Labour Court or board, dealing with the case can appropriately mould the relief by declining to grant back wages to the workman till the date he raised the demand regarding his illegal retrenchment/termination or dismissal. The Court may also in appropriate cases direct the payment of part of the back wages instead of full back wages. Reliance of the learned Counsel for the respondent management on the full bench judgment of the Punjab & Haryana High Court in Ram Chander Morya v. State of Haryana (1999) 1 SCT 141 is also of no help to him. In that case, the High Court nowhere held that the provisions

> of Article 137 of the Limitation Act were applicable in the proceedings under the Act. The Court specifically held "neither any limitation has been provided nor any guidelines to determine as to what shall be the period of limitation in such cases." However, it went on further to say that 'reasonable time in the cases of labour for demand of reference or dispute by appropriate Government to labour tribunals will be five years after which the Government can refuse to make a reference on the ground of delay and laches if there is no explanation to the delay". We are of the opinion that the Punjab and Haryana High Court was not justified in prescribing the limitation for getting the reference made or application under section 37C of the Act to be adjudicated. It is not the function of the Court to prescribe the limitation where the Legislature in its wisdom had thought it fit not to prescribe any period. The Courts admittedly interpret law and do not make laws. Personal views of the Judges presiding the Court cannot be stretched to authorize them to interpret law in such a manner which would amount to legislation intentionally left over by the Legislature. The judgment of the Full Bench of the Punjab and Haryana High Court has completely ignored the object of the Act and various pronouncements of this Court as noted hereinabove and thus is not a good law on the point of applicability of the period of limitation for the purposes of invoking the jurisdiction of the Courts/boards and tribunal under the Act."

##. Therefore, in view of the provisions of the ID Act and also in view of the aforesaid decision of the apex court in the matter of Ajaib Singh (supra), reference made by the appropriate Government cannot be rejected by the labour court and/or the tribunal as the case may be. In this case, the labour court has applied its mind properly on this aspect and, therefore, contention raised by the learned advocate Mr. Chauhan in that regard does not deserve any consideration and the same is, therefore, rejected.

##. Looking to the facts of the present case, bare perusal of the award in question makes it clear that the reference was made by the appropriate Government on 25.11.1992. The workman thereafter filed the statement of claim vide Exh. 4 and pointed out that his services

were terminated on 30th April, 1989 and he was appointed on 11.5.1987. In the statement of claim filed by the workman, it was pointed out that alongwith him, services of other four workmen were terminated. Thereafter, two workmen from them were taken back on duty and they have not been taken for work. It has also been alleged by the workmen in their statement of claim that thereafter, before some time, other one workman who was with them has been taken back on duty. The workmen have alleged that they approached on 2nd November, 1992 the first party means petitioner and requested but no satisfactory reply was given. The petitioner filed it written statement at Exh. 12 and thereafter, the workman was examined at Exh. 13 wherein he deposed that he was getting daily wage of Rs.22.75 ps. and he has undergone the training for the work of hand pump repairing. At the time of his discharge, he has not been given any notice or notice pay in lieu thereof. He has not been paid any legal rights. Presently, post of hand pump repairing is vacant in the establishment of the petitioner. Other new workmen are working in the establishment. It was also deposed by him that he made attempts to secure the alternative job after his discharge but he has not been able to secure any such job. The workman has deposed in his cross examination that he was being called as and when there is a work of hand pump repairing is available; he was being called daily; he was paid daily wage of Rs.22.75. In his cross examination, the workman has denied that he was being called only in the scarcity and availability of the work of hand pump repairing. He also denied that he was always going in the office for inquiring as to whether the work is there or not. These facts were denied by the workmen in his cross examination. Thereafter, the evidence of the workmen was closed vide Purshis Exh. 14 and thereafter, petitioner examined one of its witness J.P. Trivedi at Exh. 17 who has deposed before the labour court in his examination in chief that he is working with the petitioner since last twelve years. He is performing duties at Lunawada since last one year. It was also deposed by him that during the scarcity period, as and when required, rojamdars are being engaged. Payment is being made to the Rojamdars as per the grant. Rojamdars are being relieved by way of oral order. He has also deposed that for engaging the workman, they are being invited for work by making inquiry at the place where the workmen are gathering or at the time when the workmen would come in the office for making inquiry. It was also deposed by him that presently, work of hand pump repairing is being done by the persons from the department. It is not correct that the second party had come for work on 2.11.1992. He has also deposed that the

post of hand pump repairing is not vacant at present. He has also deposed that the recruitment is being made by calling for the names from the Employment Exchange Office. In the cross examination of the said witness for the petitioner at Exh. 17, it was deposed by him that he is knowing the second party; he is not remembering as to when the second party was engaged for work; how many other workmen were engaged for work alongwith the second party workmen is not known to him; no workmen who were with the second party are working presently in the establishment. He has stated that their office is functioning. In his cross examination, it was stated by him that the other workmen namely (1) Makwana Bhemabhai; (2) Pagi Viranbhai; (3) Ahir M.K.; (4) Barot H.M.; (5) Vankar Koyabhai M.; (6) Panchal Bhikhabhai C.; (7) Machhi Raijibhai M.; (8) Barot Hasmukh who were working with the second party workmen are working at present. Thus, the fact that those who were working with the second party workmen are continuing has been admitted by him. Thereafter, vide Exh. 18, oral evidence of the petitioner was closed and both the parties submitted their written submissions before the labour court. Ultimately, in para 9 of the award, the labour court has recorded its findings on the basis of the evidence on record. The labour court has appreciated the oral evidence of the witness for the petitioner at Exh. 17 and has rightly appreciated that the witness for the petitioner has admitted that the workmen who were working with the second party have been continued in service and they are working with the petitioner. In para 9 of the award, the labour court has observed that there is no dispute as regards the fact that the second party workmen were working with the petitioner from 11.5.87. The labour court has also appreciated the cross examination of the witness for the petitioner at Exh. 17 wherein the witness for the petitioner was asked a question as to whether the above named eight workmen have obtained training of hand pump repairing or not and in reply to that question, the witness for the petitioner replied that he is not aware of that fact. In view of such an answer given by the witness for the petitioner at Exh. 17, the labour court observed that there is reason to believe that the said eight persons have not undergone training for the work of hand pump repairing. Thus, on the basis of the said answer of the witness for the petitioner, the labour court observed and inferred that the said eight persons above named have not undergone the training for the work of hand pump repairing and the witness for the first party at Exh. 17 has not stated that the second party workmen have not undergone the training. In view of that, the labour court observed

that it has not been established from the record that the second party workmen stopped to attend the work at their own and if that was so, then, it has not been established from the record or oral evidence of the witness for the petitioner at Exh. 17 that the first party has initiated any legal proceedings before discharging the workmen. I have gone through the observations made by the labour court in para 9 of the award. According to my opinion, the petitioner first party has not been able to establish before the labour court that they have followed any procedure for discharging the workmen who were working with it since 11.5.1987 and, therefore, according to my opinion, the labour court was right in inferring that the court has reason to believe that the first party has not initiated any proceedings before discharging the second party workmen who were working with it since 11.5.1987. According to my opinion, the labour court was right in observing that the work performed by the second party workmen is continuing in the establishment of the petitioner in view of the oral evidence of the witness for the petitioner at Exh. 17. In view of that, the labour court has recorded the conclusion that the petitioner was not justified in terminating the services of the second party workman. The labour court therefore came to the conclusion that before terminating the services of the second party, no legal procedure has been followed by the petitioner first party and it was not the case of the petitioner that before doing so, they have followed any procedure whatsoever. In view of such facts emerging from the record, the labour court was right in awarding only reinstatement without back wages in favour of the workman. According to my opinion, on the basis of the facts on record, the labour court was justified in ordering for reinstatement of the workman; the labour court was right in holding that the procedure prescribed in law has not been followed by the petitioner before terminating the services of the second party workman. I am also of the opinion that the petitioner has not been justified in removing the workman without following the procedure prescribed in law as the work performed by the workman was continuing and available in the petitioner. It is a settled principle that if certain procedure has been prescribed in law and the same is required to be followed by the employer before retrenching the workman, then, such procedure must be followed by the employer before terminating the services of the workman. Not only that, even if the employer is able to establish that they have followed such procedure before terminating the services of the workman, then, the employer is also required to justify the action of termination. According to my opinion, mere compliance of the mandatory and legal

provisions for retrenching the workman is not enough but justification thereof is also equally necessary. Here, in the facts of the present case, according to my opinion, (1) the petitioner has not been able to point out and establish that it has followed the procedure and mandatory provisions prescribed in law before terminating the services of the second party workman; (2) the petitioner has also not been able to justify its act of terminating the services of the second party workman as the work performed by the workman was still continuing. Therefore, on both the counts, the action of the petitioner in retrenching the workman was wrong and the labour court was therefore, right in directing reinstatement of the workman. However, while doing so, the labour court has taken sufficient care and has considered all the relevant aspects which is evident from the ultimate directions of the labour court because in the last lines of the observations, the labour court has observed that looking to the aforesaid facts and since the works of the petitioner are based on the grant, it would be just and proper and would met interest of justice if the second party is ordered to be reinstated in service without back wages for the intervening period. Thus, while awarding reinstatement, the labour court has considered the matter as a whole. Therefore, it cannot be said that the delay aspect has not been considered by the labour court while awarding reinstatement because the labour court considered the matter as a whole and therefore denied the back wages for the intervening period.

##. Therefore, according to my opinion, considering all these aspects of the matter, the labour court was right in dealing with the matter, in appreciating the evidence on record and in coming to the conclusion that no legal procedure whatsoever has been followed by the petitioner before retrenching the workman who were working with it since 11.5.1987 continuously. It was not the case of the petitioner either before the labour court or even before this court that the petitioner has followed any procedure prescribed in law before terminating the services of the petitioner. What is sought to be canvassed by the learned advocate Mr. Chauhan before this Court is based upon the undertaking of the workman on affidavit that he accepted such terms and conditions at the time when the job was offered to him the obvious meaning thereof would be that the petitioner is not required to follow any such procedure before retrenching the workman in view of such undertaking on affidavit. However, from reading the statement of claim of the petitioner and also from

reading the award in question, it is appearing that the petitioner has not made a whisper about the so called affidavit on undertaking made by the workman (Page 21) before the labour court either in its written statement or during the course of submissions and, therefore, to that extent, the averments made by the petitioner in the memo of present petition are beyond the pleadings and they, therefore, cannot be taken into consideration as the same were not raised by it before the labour court. I am of the opinion that such an undertaking on affidavit would not absolve the petitioner from compliance of the mandatory provisions of law. Therefore, according to my view, the labour court has not committed any error while passing the award in question on the basis of the evidence on record and the pleadings of the parties. Learned advocate Mr. Chauhan has not been able to point out any jurisdictional error and/or procedure error committed by the labour court. He has also not been able to point out that the findings given by the labour court are perverse or contrary to record. This Court is having very limited powers while exercising the jurisdiction under Article 227 of the Constitution of India. Unless it is successfully pointed out that the findings recorded by the labour court are baseless, contrary to the evidence on record or perverse, or that the labour court or the tribunal has committed any procedural irregularity or jurisdictional error, this court cannot interfere with the same and, therefore, keeping these limitations in view, according to my opinion, the labour court has rightly passed the award in question which is perfectly all right requiring no interference of this court in this petition under Article 227 of the Constitution of India. Hence, there is no substance in this petition and the same is, therefore, required to be dismissed.

##. For the reasons recorded hereinabove, this petition is dismissed. Rule is discharged. Interim relief is vacated forthwith. In the facts and circumstances of the case, there shall be no order as to costs.

Dt.17.12.2003. (H.K.Rathod,J.)

Vyas